

July 29, 2014

Molly S. Stump  
Palo Alto City Attorney  
250 Hamilton Avenue, 8th Floor  
Palo Alto, CA 94301

Re: Your Request for Advice  
**Our File No. A-14-119**

Dear Ms. Stump:

This letter responds to your request for advice on behalf of Mayor Nancy Shepherd, Councilmembers Marc Berman, and Karen Holman, Planning and Transportation Commissioners Eric Rosenblum and Greg Tanaka, City Manager Jim Keene, and Planning Director Hillary Gitelman regarding their duties under the Political Reform Act (the “Act”).<sup>1</sup> We offer no opinion on the application of other laws, which may apply, such as common law conflict of interest. Moreover, this letter is based on the facts presented. The Fair Political Practices Commission does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

### QUESTIONS

1. Does the General Plan Exception contained in Regulation 18705.2(c)(2) permit the officials to participate in discussion of which broad policy alternatives to study in an Environmental Impact Report (EIR) on the City’s General Plan update (Update), and in community discussions and study sessions regarding the Update?

2. Does the General Plan Exception contained in Regulation 18705.2(c)(2) permit the officials to vote on which broad policy alternatives to study in an EIR on the Update?

3. If the exception does not apply, are the financial impacts of the governmental decision reasonably foreseeable under revised Regulation 18706?

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<sup>1</sup> The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

4. If the answers to questions 1, 2, and 3 are no, does the Public Generally exception apply?

5. If the answers to questions 1, 2, 3, and 4 are no, may the decision be segmented to allow partial participation by all Councilmembers and Planning and Transportation Commissioners?

### **CONCLUSIONS**

1 and 2. While the initial revisions to the General Plan includes focus areas, the proposed decisions are not tied to specific parcels or projects and are very general in nature. Thus, the exception in Regulation 18705.2(c)(2) applies to permit the officials to participate in discussion of which broad policy alternatives to study in an EIR on the City's General Plan update, in community discussions and study sessions regarding the Update, and the exception permits the officials to vote on which broad policy alternatives to study in an EIR on the Update.

3, 4 and 5. Since we have concluded the exception applies to the decisions described in your letter we have not analyzed these other questions.

### **FACTS**

Palo Alto is in the midst of an update to its General Plan. The Update contains both administrative and policy oriented changes. The administrative changes eliminate redundancies, reorganize sections and eliminate outdated programs. It is expected that the bulk of the existing policies and programs in the current plan will be carried forward in the Update, with the Update focusing on areas similar to those previously identified by the existing General Plan as growth opportunities.

Like the current General Plan, the draft Update recognizes the important relationship between public transit and new development. Palo Alto has two Caltrain stops (University Avenue and California Avenue) and Bus Rapid Transit stops are planned for El Camino Real. Existing City policy suggests that the Update will focus new development in these areas, though the location, pace and type of development are important policy questions that have not yet been determined. Policy discussions regarding these issues will proceed in parallel with the analysis of alternatives studied in the EIR. These policy discussions may take the form of discussion items at the Planning and Transportation Commission and City Council and community meetings in which the public officials may participate. In August 2014, the City Council will be asked to select a set of broad policy alternatives to carry forward for analysis in the EIR and for further consideration throughout the planning process. The Council may choose to study alternatives presented by staff and/or may develop additional alternatives to be included in the analysis.

At present, it is expected that all alternatives will perpetuate the City's strategy for protecting low-density residential (R-1) neighborhoods by directing growth and development to

other, mixed-use areas of the City, including the six “focus areas.” In addition, one or more of the alternatives may specify focus areas where growth and development will be curtailed, and other focus areas where continued growth and development will be allowed or encouraged. The focus areas are generally sites that currently feature mixed use or non-residential development. They include:

- 1) Palo Alto’s downtown and the nearby Stanford shopping center;
- 2) The California Avenue area;
- 3) The El Camino Real Corridor;
- 4) The East Meadow/Bayshore area;
- 5) South San Antonio Road; and
- 6) The Stanford Research Park.

In the downtown focus area, one or more of the alternatives may include elimination or modification of a cap on non-residential development currently in place. The current General Plan placed a development cap of 350,000 square feet on new commercial development in the downtown area. It is anticipated the cap will be reached within a few years. Once the cap is approached, current policy requires the City to analyze the cap and consider new downtown regulations. To address this requirement, in 2013 the City initiated preliminary data-gathering and analysis in areas referred to as the Downtown Cap primary study area and Downtown Cap peripheral study area.

According to a City Planning & Transportation Commission Staff Report presented on July 9, 2014, entitled: Comp Plan EIR Scoping and Update, the officials will generally have the following options with respect to the focus areas.

**Concept 1: Do Nothing:** (This is a legal requirement for the EIR): No changes would be made to Comp Plan land use designations or policies. Projected population and job growth would be accommodated in new development permitted under existing zoning.

- Downtown would continue to see redevelopment of low density sites to provide additional office space and the downtown cap on non-residential development would be exceeded. Separate programs related to parking management (e.g. Residential Permit Parking) could be implemented, but no new garages would be constructed, and little residential development would occur.
- El Camino Real would continue to evolve consistent with existing land use designations and zoning. Auto-oriented uses would diminish and new mixed use projects would add office and housing over retail where small parcels can be assembled for redevelopment.

- The California Avenue area would continue to experience growth pressures, with new office and housing uses on the streets surrounding Cal Avenue, and these pressures could spread to the South San Antonio area over time.
- The Stanford Research Park, Stanford Shopping Center, and East Meadow Circle/Bayshore areas would remain job centers.

***Concept 2: No Change in Land Use Designations; Policy Changes would Slow Non-Residential Development & Allow Only Modest Housing Growth to Meet State Requirements:***

In this alternative, the City would establish a procedure for controlling the pace of new commercial (office and R&D) development projects greater than 10K square feet, such as a yearly floor area cap. The City would also modify its policies and development standards to ensure that the amount of residential growth and development is modest, and focused on meeting State requirements, with an emphasis on smaller units that are affordable to people who work in Palo Alto. R-1 neighborhoods would be protected and policies would encourage the preservation of neighborhood-serving retail where it exists throughout the City. There would not be major new infrastructure investments, except this alternative would test the impacts and benefits of making roadway improvements included in the County Expressway study.

- Downtown would not change substantially from its current appearance and mix of uses, although managing the pace of non-residential development downtown would likely result in more residential development instead. The 50' height limit would remain, and one or more surface parking lots could be redeveloped to provide additional parking. El Camino Real would see increased setbacks where new buildings are developed and those buildings would not exceed three stories. Any added housing would have to be relatively low density unless it met strict affordability requirements. Retail uses would remain, and would be primarily neighborhood-serving.
- California Avenue would keep its eclectic, local-serving character, and no tall buildings would be added. The City would try to keep Fry's and encourage housing to be built on top. If Fry's did leave, then medium-density housing would be developed on that site. No new Tech Corridor overlay would be added. Parking would be provided to support any new growth in this area. Pedestrian and bicycle improvements would be prioritized.
- The Stanford Research Park, the Stanford Shopping Center, and the East Meadow Circle/Bayshore area would remain job centers. Some services for workers and a shuttle service would be added, but no housing would be added.
- The South San Antonio area would continue to support a variety of non-residential uses until market forces result in mixed-use development consistent with existing zoning.

***Concept 3: Slow Non-Residential Development & Change Land Use Designations to Focus Housing in Transit-Served Areas with Neighborhood Services.*** In this alternative, the City would establish a procedure for controlling the pace of new commercial (office and R&D) development projects greater than 10K square feet and would adjust land use designations and policies to discourage or prohibit new housing unless it's within one half mile of a Caltrain or Bus Rapid Transit stop and to increase allowable residential densities within those areas. This “swap” would effectively downzone areas that are not immediately accessible to transit in exchange for up-zoning transit served areas that include neighborhood services. R-1 neighborhoods would be protected, and policies would encourage the preservation of neighborhood-serving retail where it exists throughout the City. This alternative could test the impacts and benefits of depressing the Caltrain tracks below-grade between San Antonio Avenue and Page Mill Road.

- High density housing would be added Downtown. A slight increase to the height limit would be allowed, raising it to 55 feet as long as the additional height is used for residential units. Smaller units (studios and 1-bedroom apartments) and/or senior housing would be encouraged. The 27 University Avenue site would be developed as a transit center with workforce housing.
- Along El Camino Real, new development would be focused in nodes at planned BRT stops, and housing would be prohibited outside of identified nodes. Portions of the Stanford Research Park and the Stanford Shopping Center fronting on El Camino Real could be redeveloped to include housing if these areas also incorporate neighborhood services and are coupled with streetscape improvements and pedestrian, bike, and transit connections to downtown and California Avenue.
- California Avenue itself would remain a “quirky” low scale commercial street, and the surrounding area would accommodate additional multifamily housing at medium densities with underground parking.
- The East Meadow Circle/Bayshore and South San Antonio areas would continue to support a variety of non-residential uses, and housing would be prohibited.

***Concept 4: Explore Innovative Net-Zero Impact Concepts.*** Under this alternative, Palo Alto would lead the state and the country in testing various “net zero” concepts: Net zero greenhouse gas emissions, net zero new vehicle miles traveled (VMT), or net zero potable water use. Some policies might be applied citywide; others would be focused on specific areas. Affordable housing and neighborhood-serving retail could be exempted from such requirements, but presumably no specific growth management strategy would be needed on the theory that the “net-zero” requirements would address the pace and impacts of development. R-1 neighborhoods would be protected and policies would encourage the preservation and expansion of neighborhood-serving retail throughout the City.

- The current Downtown Cap on non-residential development would be replaced with a restriction on net new vehicle trips. The area would retain its current mix of uses and would be promoted as a cultural gathering place for all ages, with a full range of services for residents and employees. Significant pedestrian improvements would be introduced, along with improvements to the Caltrain station and transit center intended to make downtown a regional transit hub with free shuttle service to destinations throughout the City.
- Along El Camino Real, mixed use development with ground floor retail and residential above and behind would be allowed. While new development would be two or three stories in most areas, it could exceed the 50-foot height limit at three nodes along the corridor, where projects would be models of sustainability, with small units, car share and transit access rather than resident parking, net-zero energy, and net-zero greenhouse gas emissions. Wider sidewalks and bike enhancements would be prioritized along El Camino, and local energy/solar panels would be strongly encouraged all along the corridor on new and old buildings.
- California Avenue itself would see little change in this alternative and would remain an eclectic, neighborhood-serving retail destination but the surrounding area would evolve to include more jobs and housing. Specifically, the Fry's site would transform to include a mix of uses with housing over commercial, with public gardens serving the new homes. A Tech Corridor overlay along Park Boulevard would facilitate the creation of small new tech companies and Park Boulevard itself would become a true "boulevard" with substantial pedestrian and bicycle improvements.
- The Stanford Research Park would become a cutting-edge proving ground for innovative concepts in energy generation, carbon sequestration, recycled water, urban farming, and drought-tolerant landscaping. In some areas, existing surface parking could be undergrounded and covered with vertical mixed use buildings, surrounding plazas and public gathering places, including restaurants and nighttime retail. In these areas, new housing would include townhomes, apartments, and lofts, and new streets would be added to break up the current "superblocks." A bike sharing program and a new free shuttle would serve residents and workers alike. All landscaping would be required to utilize low/no water plants.
- The East Meadow Circle area would be transformed from a research and office park to a new village center with housing around a central plaza, as well as a potential new school. The office and light industrial uses along Fabian Way and Bayshore would remain as is and transit service to the area would be dramatically improved. In the South San Antonio area, existing businesses would be protected from displacement, although there could be limited new housing once walkability and transit connections to/from Caltrain are improved.

In the course of discussing the Update alternatives, it is possible that councilmembers may suggest specific ways that the downtown development cap and other development regulations maybe modified in each broad scenario. For example, in discussing the merits of a transit-focused alternative, a councilmember may question whether such an alternative should include certain incentives such as increased height or floor area for workforce housing in the downtown and/or California Avenue areas.

The officials' interests are:

- Mayor Nancy Shepherd owns a residence within 500 feet of the El Camino Real focus area. Shepherd also has business interests in her husband's law firm, which leases a property in the downtown focus area and within the Downtown Cap primary study area.
- Councilmember Marc Berman owns a residence in the downtown focus area and within 500 feet of the Downtown Cap primary study area.
- Councilmember Karen Holman owns a residence near the downtown focus area but more than 500 feet from the Downtown Cap primary study area.
- Planning Commissioner Eric Rosenblum owns a residence in the downtown focus area and within 500 feet of the Downtown Cap primary study area.
- Planning Commissioner Gregory Tanaka owns a residence within 500 feet of the Research Park focus area.
- City Manager Jim Keene owns a residence in the downtown focus area and within 500 feet of the Downtown Cap primary study area.
- Planning Director Hillary Gitelman leases a residence in the downtown focus area and within 500 feet of the Downtown Cap primary study area.

## CONCLUSIONS AND ANALYSIS

*1 and 2. Does the General Plan Exception contained in Regulation 18705.2(c)(2) permit the officials to participate in discussion of which broad policy alternatives to study in an Environmental Impact Report (EIR) on the City's General Plan update (Update), in community discussions and study sessions regarding the Update, and does the exception permit the officials to vote on which broad policy alternatives to study in an EIR on the Update?*

Regulation 18705.2(c)(2) provides an exception for certain decisions regarding General Plans and General Plan amendments as follows:

“The decision solely concerns the adoption or amendment of a general plan and all of the following apply:

“(A) The decision only identifies planning objectives or is otherwise exclusively one of policy. A decision will not qualify under this subdivision if the decision is initiated by the public official, by a person that is a financial interest to the public official, or by a person representing either the public official or a financial interest to the public official.

“(B) The decision requires a further decision or decisions by the public official’s agency before implementing the planning or policy objectives, such as permitting, licensing, rezoning, or the approval of or change to a zoning variance, land use ordinance, or specific plan or its equivalent.

“(C) The decision does not concern an identifiable parcel or parcels or development project. A decision does not “concern an identifiable parcel or parcels” solely because, in the proceeding before the agency in which the decision is made, the parcel or parcels are merely included in an area depicted on a map or diagram offered in connection with the decision, provided that the map or diagram depicts all parcels located within the agency’s jurisdiction and economic interests of the official are not singled out.

“(D) The decision does not concern the agency’s prior, concurrent, or subsequent approval of, or change to, a permit, license, zoning designation, zoning variance, land use ordinance, or specific plan or its equivalent.”

The public officials discussed above each have ownership or leasehold interests in real property within 500 feet of a focus area likely to be discussed during consideration of General Plan alternatives proposed for further study. In some cases, those interests are also within 500 feet of the Downtown Cap primary study area.

You stated that you believed this exception applied to the current stage of the General Plan amendment process. You stated:

“[A]ll four conditions are satisfied. First, the decision before the Public Officials is fundamentally one of policy. The Public Officials are choosing between broad options that will shape future of the City as a whole. Even if discussion of the alternatives includes examples of specific development regulations that might be modified to achieve the desired outcomes, the ultimate decision before the Public Officials is one of City-wide policy.

“Second, the decision will not directly result in permitting, licensing, or rezoning, nor will it result in approval or changes to a variance, land use ordinance, or specific plan or its equivalent. All of these actions would require further action by the City.



“Third, the decision does not concern an identifiable parcel or parcels or development project. The FPPC has found the exception to apply where a decision “identifies geographical regions of interest but addresses goals and objectives not tied to specific parcels or projects.” (*Norton* Informal Assistance Letter, 1-09-058.) Although focus areas have defined boundaries on a map, the decision before the Public Officials deals with an entire district in the City, not a specific parcel or parcels. Similarly, while one could count all of the parcels within the boundaries of the Downtown Cap primary study area, none of those parcels is specifically identified nor are any of them a subject of the decision. The inclusion of boundaries for both focus areas and the Downtown Cap primary study area is necessary for intelligent public participation and discussion, but does not convert the decision into one that concerns an identifiable parcel or parcels. (See generally *Barker* Informal Assistance Letter, 1-02-170; *Murphy* Advice Letter, A-07- 031 [“real property economic interests would appear to be indirectly involved ... as long as the discussion does not specifically concern any of the properties with boundaries located within 500 feet of the real property economic interest... ) [emphasis added].)

“Fourth, the choice of broad policy alternatives to study in a General Plan EIR and examine through an extended planning process does not concern the City’s prior, concurrent or subsequent approval of, or change to, a permit, license, zoning designation, zoning variance, land use ordinance, or specific plan or its equivalent.”

Obviously, application of the exception is dependent on the facts of the particular decision. However, as you have indicated, it is helpful to look at the past applications of the rule to see the type of facts to which it was applied. Note that the original purpose of the exception was to shift the standard applicable to directly involved real property to a less stringent test for indirectly involved real property if the exception applied. The discussion of the exception in prior letters indicates this. However, under the current rule, effects caused by decisions that meet the exception are not considered material and no conflict of interest exists.

- *Fleishman* Advice Letter, No. A-11-221: The exception did not apply because the parcels subject to the decisions were identified in the proposed amendment and did not include all the parcels located within the city’s jurisdiction.
- *Norton* Advice letter, No. I-09-058: Because the City’s proposed plan identified geographical regions of interest, but addressed goals and objectives not tied to specific parcels or projects, the city attorney was advised the exception did apply. “The facts you have provided us, and the proposed general plan amendments, indicate that this exception applies to the general plan updates presently expected to come before the city council for approval. This conclusion will remain correct so long as the updated city plan serves simply to identify planning objectives, the amendments were not initiated by the councilmember, his agents, or their economic interests, the decision to approve the

amendments would require further decisions prior to implementing the planning objectives, and the decision does not concern an identifiable parcel or parcels or development project.”

- *Barker Advice Letter, No. I-08-170*: “Under this exception, each of the city council members’ real property economic interests would appear to be indirectly involved in this part of the governmental decision, and, so long as the discussion does not involve an ‘identifiable parcel or parcels’ (i.e. the discussion does not specifically concern any of the properties with boundaries located within 500 feet of the real property economic interest of one of the councilmembers), they may participate in the public hearing phase. However, if it does involve an ‘identifiable parcel or parcels’, the exception would not be applicable, and the real property of any official located within 500 feet of the ‘identifiable parcel or parcels’ would still be directly involved in that part of the decision and that official would have to follow the procedures set forth in Regulation 18702.5.”
- *Hull Advice Letter, File No. A-05-057*: The Chula Vista city attorney’s office asked if a councilmember could participate in his official capacity, in community meetings, informational sessions and/or city council workshops or hearings regarding the city’s general plan update despite the fact that the councilmember resided in an area for which the city was evaluating the existing land use designations. The council member was advised that because the general plan proposed changes to properties within 500 feet of the councilmember’s residence (identifiable parcels of land), the exception would not apply.

Under your facts, similar to those in the *Norton* letter, the initial revisions to the General Plan include goals and objectives for focus areas in the City, but the proposed goals and objectives are not tied to specific parcels or projects and are very general in nature. Based on these facts, the exception in Regulation 18705.2(c)(2) applies to permit the officials to participate in discussion of which broad policy alternatives to study in an EIR on the Update, in community discussions and study sessions regarding the Update, and the exception permits the officials to vote on which broad policy alternatives to study in an EIR on the Update.

Of course the exception is not a license for the officials to participate in a discussion that does affect specific parcels or properties even in the context of the more general discussions. Thus, you will need to monitor how the upcoming meeting and future meetings evolve and request additional advice as necessary.

*3, 4, and 5. If the General Plan exception does not apply to certain decisions, are the financial impacts of the governmental decision reasonably foreseeable under the Commission’s revised Regulation 18706; Does the Public Generally Exception apply; and can the decision be segmented?*

Since we have concluded the “General Plan” exception applies to the decisions described in your letter we have not analyzed these other questions.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini  
General Counsel

By: John W. Wallace  
Assistant General Counsel  
Legal Division

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